Supreme Court, U.S.
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No. 94-310

In The

Supreme Court of the United States

October Term, 1994

GARY L. LEKVOLD,

Petitioner,

v.

WESTINGHOUSE HANFORD COMPANY,
a Delaware corporation;
WESTINGHOUSE ELECTRIC CORPORATION,
a Pennsylvania corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

STUART R. DUNWOODY*
WILLIAM R. SQUIRES III
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
*Counsel of Record

Attorneys for Respondents

Of Counsel:
ROBERT A. DUTTON
Assistant General Counsel
Westinghouse Hanford Co.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Whether "special factors" exist and bar a former employee of a government contractor at a Department of Energy facility from maintaining a *Bivens* action against his former employer where Congress' enactment of some remedies and its repeated consideration and rejection of proposed legislation to create additional remedies shows that its failure to create the precise remedy that the employee seeks has not been inadvertent.

RULE 29.1 LISTING

Westinghouse Electric Corporation is the parent company of Westinghouse Hanford Company. Westinghouse Hanford Company has no other parent companies and no subsidiaries.

Westinghouse Electric Corporation has the following subsidiaries (other than wholly-owned subsidiaries):

Micros System, Inc.
New World Power Corp.
Royal International Optical, Inc.
The Actava Group, Inc.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner was employed by respondent Westinghouse Hanford Company ("WHC") at the Hanford Nuclear Reservation in Southeastern Washington, an installation owned by the United States and managed by the United States Department of Energy. WHC manages portions of the site under contract with DOE.

Petitioner alleges in his complaint that he had disagreements with his supervisors regarding the physical

security of nuclear materials stored at the Hanford Reservation, and concluded that WHC management did not intend to take the necessary measures to protect the public from theft of nuclear materials. In February 1989, petitioner wrote to Michael Lawrence, the senior DOE official at the Hanford Reservation, expressing his concerns. DOE promptly assigned an independent investigator to look into petitioner's allegations, who found no basis to support them.

Petitioner alleges that WHC retaliated against him for expressing his concerns. WHC suspended petitioner in March 1989 for violations of attendance and time card rules, but, as he admits, "his employment status continued," Pet. at 5, and WHC continued to pay him his salary.[1]

Petitioner filed suit in the United States District Court for the Eastern District of Washington, asserting claims against WHC under the First and Fifth Amendments to the United States Constitution and seeking thirty-three million dollars in damages. Petitioner founded his claims on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which permits, under certain circumstances, damages

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[1] After this action was filed, DOE independently revoked petitioner's security clearance, Pet. at 6, on the authority set forth in 10 C.F.R. Part 710 because he gave false answers to questions concerning his use of marijuana. Because petitioner's position required a security clearance, WHC then terminated his employment.

suits against federal officials who violate federal constitutional rights under color of federal law.[2] Petitioner claims that WHC is subject to suit under *Bivens* because it is a "federal actor." Although WHC denies that it is a federal actor, it did not seek summary judgment on the issue and the courts below did not rule on it or on any other allegation contained in the complaint.[3]

The district court dismissed petitioner's constitutional claims with prejudice on the ground that the "special factors counseling hesitation" recognized by this Court in *Bivens* exist and preclude petitioner from maintaining a *Bivens* action, and dismissed his state law claims against Westinghouse Electric Corporation without prejudice. The court of appeals affirmed, relying on its recent decision in *Bricker v. Rockwell International Corp.*, 22 F.3d 871 (9th Cir. 1993), *petition for cert. filed*, No. 94-120 (U.S. July 14, 1994).

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[2] Petitioner's complaint also asserted state law tort claims (but not the federal constitutional claims) against WHC's parent corporation, Westinghouse Electric Corporation. After filing his federal court action, petitioner filed state law claims against WHC in the Superior Court of Franklin County, Washington; those claims are still pending.

[3] The allegations of wrongdoing set forth in the Petition, which respondents vigorously deny, thus remain unproved. Respondents will not engage in a point by point rebuttal of the factual misstatements contained in the Petition, however, because they have no bearing on the question of what issues would properly be before the Court if certiorari were granted. *See* S. Ct. R. 15.1.

REASONS FOR DENYING THE WRIT

The Petition should be denied, both because the issue it presents will not recur in future cases and thus is of historical interest only, and because the decisions below were correctly decided and are fully consistent with the decisions of this Court and of the courts of appeals.

I. The Issue Petitioner Presents Is Not Sufficiently Important to Justify Review by This Court.

A recent statutory amendment ensures that the question that petitioner presents will not arise in cases that are filed after October 24, 1992. The issue thus is a narrow one that does not justify review by this Court on certiorari.

The question that petitioner presents is whether the "special factors" recognized by this Court in *Bivens* and its progeny preclude a plaintiff such as petitioner, who claims that he has suffered retaliation for voicing safety or health concerns relating to a DOE installation, from maintaining a damages action directly under the United States Constitution. A recent amendment to Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, providing remedies for employees of DOE contractors who have claims for such retaliation arising on or after October 24, 1992,[4] constitutes, under this Court's decisions in *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487

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[4] The amendment was made by the Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(a), 106 Stat. 2776, 3123 (1992), and applies to claims that are filed on or after the date of its enactment, October 24, 1992. *Id.*, § 2902(i), 106 Stat. at 3125.

U.S. 412 (1988), a "special factor" that would bar any *Bivens* actions by DOE contractor employees for claims arising after that date.

The question that petitioner presents, therefore, is whether special factors existed *before* Congress amended Section 210 of the Energy Reorganization Act in October of 1992. This question will only have bearing on those claims by employees of DOE contractors that arose before October 24, 1992 and are not yet barred by the statute of limitations.[5] The issue thus is of historical interest only and will not recur in future cases. It is not an issue worthy of this Court's review on certiorari.

II. The Decision of the Court of Appeals Is Correct and Is Consistent With Other Authority.

In any event, the decisions below are correct and do not conflict with any other authority.

Under this Court's decisions in *Bush* and *Chilicky*, special factors bar a *Bivens* suit even where no alternative remedy exists for the harm that the plaintiff alleges, so long as Congress' failure to provide the precise remedy that the plaintiff seeks has not been inadvertent. *Chilicky*, 487 U.S. at 423. The courts below correctly held that

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[5] Counsel for respondents are aware of only one other case currently pending in which an employee of a DOE contractor asserts a *Bivens* claim that arose before October 24, 1992 against his employer, *Bricker v. Rockwell International Corp.*, 22 F.3d 871 (9th Cir. 1993), *petition for cert. filed*, No. 94-120 (U.S. July 14, 1994).

Congress' failure to create a remedy for persons in petitioner's position – an employee of a DOE contractor who voices safety concerns at a DOE installation – was anything but inadvertent.

This is clear first from Congress' enactment in 1978 of Section 210 of the Energy Reorganization Act. As originally enacted, Section 210 protected only employees of commercial nuclear facilities from retaliation. 42 U.S.C. § 5851 (1988). As the Fourth Circuit recognized in *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir.), *cert. denied*, 112 S. Ct. 122 (1991), Congress deliberately excluded employees of DOE contractors from the protections of Section 210 when it first enacted the statute. Its failure to provide those protections to persons such as petitioner thus was not inadvertent.

Congress' lack of inadvertence in providing the remedy petitioner seeks for employees of DOE contractors was repeatedly demonstrated between 1978, when Section 210 was first enacted, and 1992, when it was finally amended to include employees of DOE contractors. During that time Congress repeatedly considered and, until 1992, rejected bills that would create protections for whistleblowers at DOE installations.[6] Although none of the bills was enacted, they received substantial attention from Congress. Many of the bills had numerous co-sponsors. One bill, S. 436, 101st Cong., 1st Sess. (1989), was favorably reported to the full Senate in a report noting

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[6] Some (but not all) of these bills are cited in the Ninth Circuit's opinion in *Bricker v. Rockwell*, 22 F.3d at 875 n.4, which was the basis for the opinion of the court of appeals in this case.

the current lack of whistleblower protection for contractor employees at DOE facilities. *See* S. Rep. No. 349, 101st Cong., 2d Sess. 17-18 (1990). Furthermore, Congress considered these bills at the same time that it was enacting whistleblower protections for other classes of employees.[7] These failed bills thus show that Congress' failure to enact protections for DOE employees before October 1992 was not inadvertent.[8]

Finally, as the court of appeals recognized, Congress' lack of inadvertence is shown by the very enactment of the amendments to Section 210 and by the decision to give those amendments only prospective effect. Pet. App. at App. 5 – App. 6.

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[7] For example, a bill to create whistleblower protections for employees of Department of Defense contractors, H.R. 2579, 101st Cong., 1st Sess., and a bill to create protections for employees of DOE contractors, H.R. 3255, 101st Cong., 1st Sess., were both considered at a joint hearing of a subcommittee of the House Armed Services Committee. *See* Lexis Bill Tracking Reports 1989 H.R. 2579 and 1989 H.R. 3255. Congress enacted the first bill as part of the Defense Authorization Act for Fiscal Year 1991, 10 U.S.C. § 2409a, but failed to enact the bill that would have created similar protections for DOE contractor employees.

[8] The courts below did not consider the failed legislation to construe a previously enacted statute, *see* Pet. at 12 (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*. 496 U.S. 633, 650 (1990)). Rather, they properly considered the failed bills to determine that Congress was aware of the issue and that its failure to enact the remedy that petitioners seek was not inadvertent. *See Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STUART R. DUNWOODY*
WILLIAM R. SQUIRES III
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
*Counsel of Record

Attorneys for Respondents

Of Counsel:

ROBERT A. DUTTON
Assistant General Counsel
Westinghouse Hanford Co.

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